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June 28, 2013

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, SW Room TWA325 Washington, DC 20554

Re: Notice of Ex Parte Presentation

CG Docket No. 02-278

Dear Ms. Dortch:

On Wednesday, June 26, 2013, Mark W. Brennan, counsel to Communication Innovators ("CI"), along with David McCann, President & Chief Executive Officer of Varolii Corporation ("Varolii"), and Brian Moore, Executive Director & Industry Practice Leader of Varolii, met with Kurt Schroeder and Kristi Lemoine from the Commission's Consumer & Governmental Affairs Bureau to discuss the customer service benefits to consumers from non-telemarketing calls made using predictive dialer solutions and other new technologies under the Telephone Consumer Protection Act ("TCPA").

As described in the attached slides that were distributed at the meeting, the representatives explained that there are dozens of detailed examples where predictive dialer solutions and other new technologies are used today to place critical, time-sensitive non-telemarketing customer service calls to benefit consumers, including in the healthcare, financial services, transportation, and other sectors. As demonstrated by these examples, today's predictive dialer solutions (many of which are software- or cloud-based solutions) promote consumer-friendly calling practices and allow businesses with a legitimate need to contact large numbers of specific customers for particular non-telemarketing purposes to do so accurately, efficiently, and cost-effectively while complying with federal and state consumer protection laws. They connect live representatives with consumers as quickly as possible to provide timely, useful information.

The representatives also discussed the rise of the mobile, digital consumer and noted that nearly two in five American homes are wireless-only. The representatives provided data confirming that consumers expect timely customer service communications from companies with whom they do

¹ See, e.g., Ex Parte Letter filed by Communication Innovators et al., CG Docket No. 02-278 (filed June 17, 2013).

business. For example, a recent survey confirmed that consumers overwhelmingly agreed that their banks should immediately alert them about low balances or insufficient funds in the account. More than half of those surveyed also wanted to be notified about any unusual account activity or changes to the account information. In addition, the representatives provided data confirming that all available contact channels - including calls and text messages to wireless telephones - are needed to reach consumers effectively with time-sensitive information.

The representatives explained that the current TCPA landscape is inhibiting customer service. Specifically, there is significant confusion by courts over the Commission's prior TCPA decisions regarding the applicability of the TCPA to predictive dialers, and some courts are now interpreting the Commission's prior TCPA rulings to mean that all predictive dialers are "autodialers" even if they do not meet the statutory definition of an "autodialer." As a result, companies are being sued in TCPA class actions and are facing potentially devastating penalties just for using predictive dialers or other new technologies. More than 500 TCPA cases have already been filed in court this year (nearly double the number of cases filed during the same period a year ago), with many involving allegations of predictive dialer use. The representatives stated that the specter of continued (and increasing) litigation is causing some leading companies to consider whether to stop placing many of the beneficial non-telemarketing customer service calls mentioned above.

The Commission can resolve much of this litigation – and facilitate beneficial customer service communications – by granting the CI Petition for Declaratory Ruling and clarifying that a predictive dialer solution or other new technology that does not meet the statutory requirements of an "autodialer" is not an "autodialer." To provide meaningful relief, however, the Commission must specifically clarify the scope of the term "autodialer" under the TCPA. For example, clarifying the meaning of "prior express consent" instead of clarifying the term "autodialer" will provide no protection against opportunistic TCPA plaintiffs and will instead encourage further unnecessary litigation and increase costs to consumers, undermining the TCPA's consumer protection goals.

In addition, any clarification must remain consistent with the statutory text of and legislative intent behind the TCPA – including by giving meaning to the phrase "using a random or sequential number generator."² It must also remain consistent with the FCC's longstanding precedent that the autodialer restriction "clearly" does not apply "to functions like 'speed dialing,' 'call forwarding," and other services where "the numbers called are not generated in a random or sequential fashion." Any approach that fails to give effect to these elements would not only be contrary to law but extremely harmful to consumers, as it would sweep in all kinds of electronics, including smartphones and many software- or cloud-based services where no "equipment" is being used, under the definition of "autodialer."

Any clarification of the term "capacity" must also be consistent with the TCPA's text and underlying Congressional intent. Specifically, the autodialer restriction only applies to equipment that "has the capacity" to store or produce, and dial, randomly or sequentially generated numbers. It does not extend to equipment - or software - that could be modified to provide such capacity.

See 47 U.S.C. § 227(a)(1).

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).

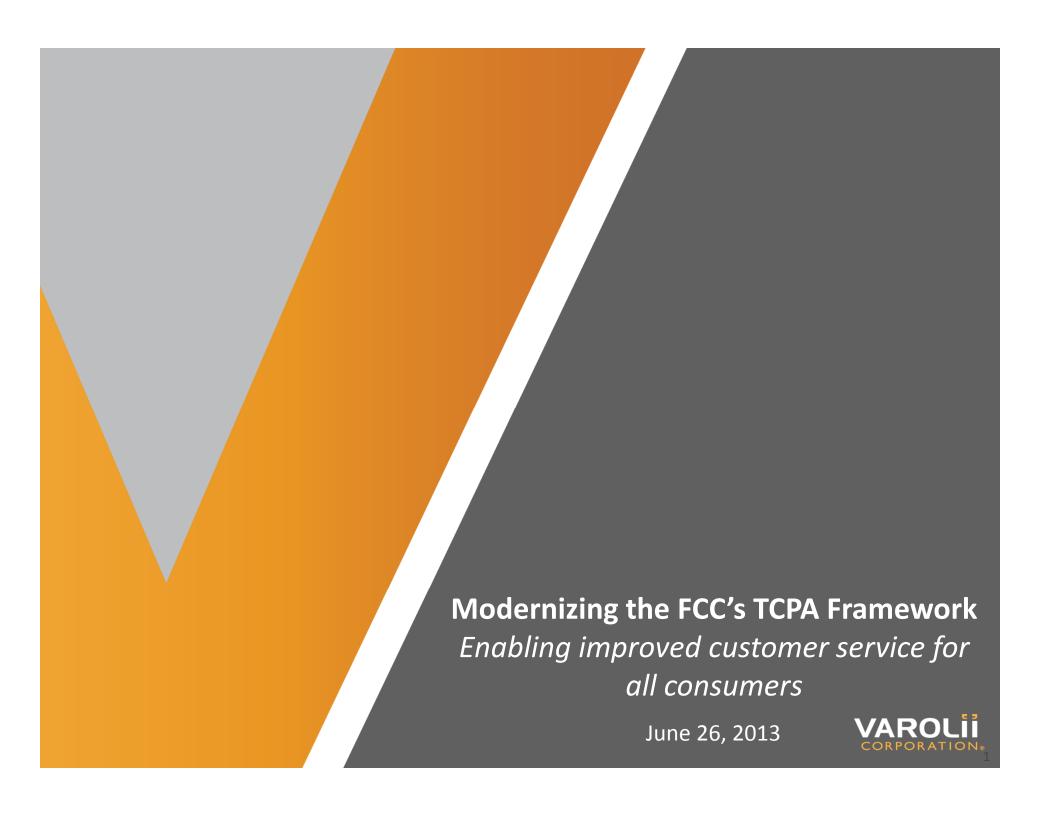
Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

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cc: Kurt Schroeder Kristi Lemoine





Agenda

- The Rise of the Mobile, Digital Customer
- Current TCPA Landscape Inhibits Beneficial Customer Services
- Examples From Financial Services, Airlines, and Healthcare
- Consumer Behavior Studies on Consent



What a Difference 22 Years Can Make

Mobile subscriptions have increased 40X; landlines down 35% since TCPA enacted

1991

- Only 7.6 million mobile phone subscribers compared to 140 million landlines
- Car phones cost \$500; mobile phones (like the MicroTAC) \$3,000
- Rate plans were \$50-100 per month plus usage @ \$.40-1.00 per minute; monthly bills average \$400



2013

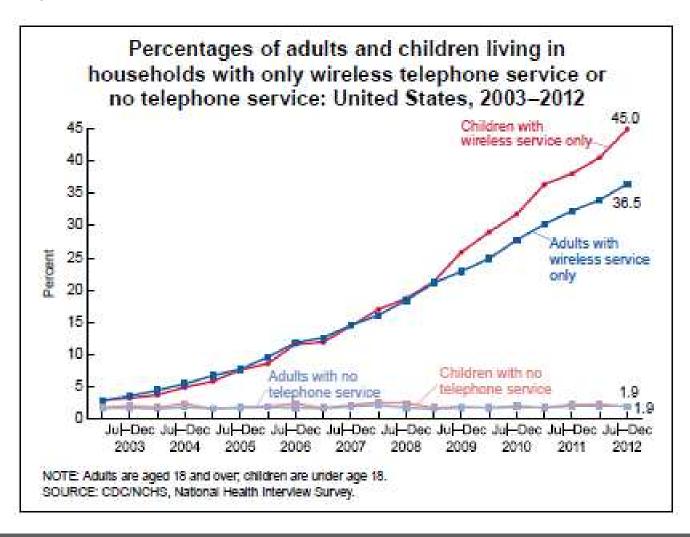
- More than 300 million mobile phone subscribers compared to 90 million landlines
- Smartphones are available at zero cost with contract
- Most carriers offer unlimited voice
 & text usage for \$50 per month





"Mobile-Only" & "Mobile-Mostly" Households Steadily Increasing

The only way for businesses to reach these customers is on their mobile phone





Current TCPA Landscape is Inhibiting Beneficial Customer Service

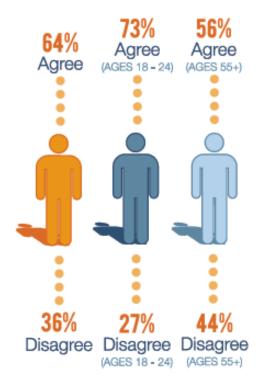
This thwarts government & consumer interest in better service across industries

- U.S. businesses rely on advanced communication technology to cost-effectively deliver important, time-critical information to customers, including Predictive Dialing Systems, Interactive Voice Messages and SMS Text Messages
- Consumer acceptance of these for non-marketing communication is high, exceeding postal and email
 - A top 10 mortgage servicer uses an interactive voice message to successfully deliver status updates to over 42% of the borrowers applying for loan modifications under HAMP
 - A major airline reaches over 45% of passengers impacted by a flight delay or cancellation
 - A top 5 credit card issuer interacts with over 43% of cardholders with potentially fraudulent activity on their account
 - A leading healthcare provider contacts over 65% of patients eligible for enrollment in a employer paid wellness program
- Unfortunately, the current TCPA landscape makes such communications risky
 - Companies must be able to demonstrate "prior express consent" before using certain technologies to deliver such informational communications to their customer's mobile phones, but there is no clear definition of "capacity" or "prior express consent" under the TCPA
 - This has led to varying & contradictory interpretations in federal courts
 - Obtaining and verifying such consent is difficult, especially if the customer relationship is facilitated by a third party
 - As a result, the approximately 40% of American consumers who identify their mobile device as their primary or exclusive means of communication do not receive many of these messages



Customers Expect Timely Communication From Their Banks To Prevent Overdrafts

IT IS MY BANK'S RESPONSIBILITY TO IMMEDIATELY ALERT ME WHEN I HAVE A LOW BALANCE OR INSUFFICIENT FUNDS TO PAY A BILL.



More than half (54 percent) also want to be notified if there is unusual activity on their account or if someone makes a change to their account information.

Source: Survey of 627 Americans by Wakefield Research & Varolii December 2012



Passengers Need Notification of Flight Delays

Flight Status Changes

Requires U.S. and foreign air carriers operating scheduled passenger service with any aircraft with 30 or more seats to promptly notify consumers through whatever means is available...of delays of 30 minutes or more, cancellations and diversions within 30 minutes of the carrier becoming aware of a change in the status of a flight.

Source: Enhancing Airline Passenger Protections (DOT-OST-2010-0140)



Distressed Borrowers Deserve Foreclosure Prevention Options

cfp	Consumer Financia Protection Bureau	al			Contact us (855) 411-2372
HOME	INSIDE THE CFPB	GET ASSISTANCE	PARTICIPATE	LAW & REGULATION	SUBMIT A COMPLAINT

HOME > BLOG > NEW RULES, FEWER RUNAROUNDS FOR MORTGAGE BORROWERS

JAN 17 2013





New rules, fewer runarounds for mortgage borrowers

BY DAVID SILBERMAN

REGULAR, CLEAR COMMUNICATION FROM SERVICERS

Who services your mortgage, how to get in touch with them, and what you owe should not be mysterious. The new rules include requirements to improve the communication from servicers to mortgage borrowers.

Early outreach when a borrower falls behind: If you become delinquent, the servicer has to make a good faith effort to reach out to you. The servicer also has to assign people to your case and make those people available by phone so you have a clear and consistent point of contact.

Source: CFPB blog January 17, 2013 announcing Final Mortgage Servicing Rules



Healthcare Must Be Improved While Lowering Costs

- Affordable Care Act (ACA) driving creation of accountable care organizations
 - Medicare reimbursement is tied to achieving clinical quality measures (CQM)
 - Patient follow-up is key to improving CQM for chronic conditions (e.g., diabetes)
 and behavior modification (e.g., obesity & smoking)
 - TCPA environment interferes with effective patient engagement

Follow up with patients who are trying to quit.

 If possible, follow up with your patient either in person or by telephone within a week of her quit date. A second follow-up is recommended within the first month.

"How is it going?"
"How are you feeling?"

• If the patient has not smoked, offer congratulations and encouragement.

"You're doing a great job. This is such an important step to take."

 If the patient has smoked, consider revisiting Sections B, C, and D above

"Quitting can be very difficult. It can often take someone several tries to successfully quit. Would you like to try again?"

Source: "Help Your Patients Quit Smoking", NYC Health, November 2010

F HOW TO MAINTAIN WEIGHT LOSS

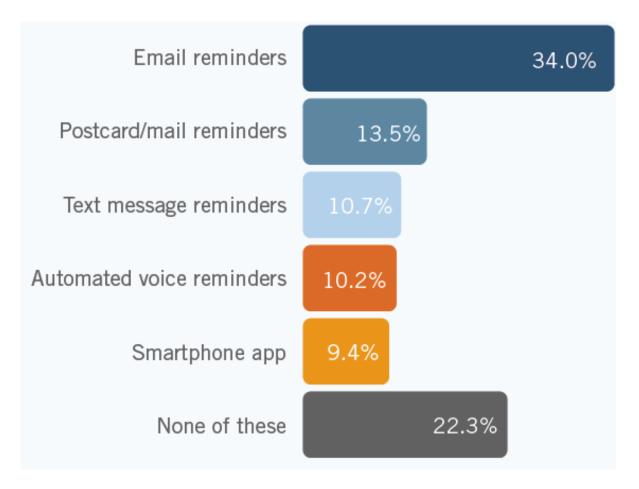
The literature suggests that weight loss and weight maintenance therapies that provide a greater frequency of contacts between the patient and the practitioner and are provided over the long term should be put in place. This can lead to more successful weight loss and weight maintenance. Evidence Category C.

Source: "CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OFOVERWEIGHT AND OBESITY IN ADULTS", NIH PUBLICATION NO. 98-4083 SEPTEMBER 1998



Primary research: All channels needed to reach patients

Channel preference for maintaining a doctor-prescribed treatment plan



Source: <u>Varolii-Wakefield Consumer Interaction Study</u>, Q3 2012 (primary research,1001 patients)



Consumer Consent Behavior Studies

"Status quo bias" deters opt-in to beneficial programs

Organ Donation Consent Rates

